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No. 88-660

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

SIMKINS INDUSTRIES, INC.,
Petitioner,
v.
SIERRA CLUB,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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PETITIONER'S REPLY TO BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

1. Does § 505 of the Clean Water Act abridge the Article III standing requirement of "redressability" by authorizing private citizens to seek a judicial award of penalties to the United States Treasury?

2. In reviewing a summary judgment rendered in direct conflict with *Gwaltney of Smithfield v. Chesapeake Bay Foundation, Inc.*, 484 U.S. 29 (1987), did the Court of Appeals err by finding a continuing violation of the Clean Water Act never charged by complaint or motion and negated by the unchallenged findings of fact?

[Note: Petitioner reserves the right to argue Question 3 in the event certiorari is granted on both the above questions, but does not include Question 3 among the reasons for the grant of certiorari.]

3. Did the court below err in holding that the failure to file discharge-monitoring reports, without more, constitutes the violation of "an effluent standard or limitation"—the jurisdictional requisite of a citizen suit under § 505(a) of the Clean Water Act?

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On December 12, 1988, the Court invited the Solicitor General to file a brief expressing the views of the United States. 109 S.Ct. 553. On May 28, 1989, the Government filed an 18-page brief amicus curiae urging denial of the writ of certiorari. Petitioner disagrees with that recommendation and the flawed reasoning behind it.

ARGUMENT

1. Last term, in *Gwaltney of Smithfield v. Chesapeake Bay Foundation, Inc.*, 484 U.S. 29, 108 S.Ct. 376 (1987) ("*Gwaltney*"), the former Solicitor General identified the Article III redressability problem engendered by citizen suits for civil penalties:

> * * * A citizen plaintiff who alleges that he is adversely affected by a company's ongoing violation of its discharge permit and requests an injunction requiring compliance can satisfactorily demonstrate, *at least at the pleading stage*, both personal injury

> and redressability. However, a citizen who brings suit simply to obtain a judicial assessment of civil penalties for nonrecurring past violations would fail to meet Article III's requirement; *the mere assessment of civil penalties, which are payable only to the Treasury, would not redress in a meaningful sense that citizen's alleged injuries.* c.f., *Linda R.S. v. Richard D.*, 410 U.S. 614 (1973), * * *

86-473 U.S. Br. 21 n.34 (italics added).

Unaccountably, the Government now alters its stated position (Gov. Br. 13 n.14). It submits that its concern in *Gwaltney* "was limited to the situation where the citizen plaintiff did not face any prospect of the future injury" and that one "who *did allege* ongoing noncompliance could satisfy Article III's standing requirement" (*ibid*; italics in original). The Government's brief does not even cite *Linda R.S. v. Richard D., supra*, much less discuss the Article III implications of that holding or its progeny (Pet. 18-19).

Nor does the Government discuss why mere *allegations* will support Article III standing to obtain judgment for penalties only when the *facts* do not support any relief. In *Gwaltney*, the Court held not only that a citizen-plaintiff must "allege a state of either continuous or intermittent violation," 108 S.Ct. at 381, as a jurisdictional requisite to bringing suit, *but is required by Article III at trial to "prove the allegations in order to prevail." Id.*, at 386 (italics added). Although the Government attempts to cloud Article III redressability with irrelevant arguments about statutory requisites,[1] the fact remains

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[1] Whether or not the Sierra Club met *Gwaltney's* statutory requisites presents another question (Pet. 20-28; Gov. Br. 14-17), separate and distinct from the Article III redressability inquiry to which this Reply is devoted. The Government, while purporting to discuss redressability, seems to focus instead upon the situation alleged on October 31, 1984, when suit was filed, instead of viewing the case as it actually existed when the penalties were assessed on July 31, 1986. The Article III standing inquiry is not exhausted at the pleading stage but must be examined when the court exercises judicial power to order relief. *Bender v. Williamsport Area*

that even if ongoing noncompliance was properly alleged, the trial court was satisfied before entry of judgment that compliance had been achieved.[2] It not only issued no injunction but found no basis for one. Injunctive relief became moot when Respondent, Sierra Club, failed to obtain it and took no appeal from its denial. *Deakins v. Monaghan*, 108 S.Ct. 523, 529 (1988).

Consequently, this case exemplifies "an action solely for civil penalties for past, nonrecurring violations." *Id.* at 382 n.3. Nonetheless, the Government endorses the right of the Sierra Club (although questioning standing in at least one vital respect)[3] to maintain a citizen suit

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School Dist., 475 U.S. 534, 541 (1986); see *id.* at 551 (dissenting opinion). See *Diamond v. Charles*, 476 U.S. 54, 59 69 (1986) (party seeking to continue the suit must satisfy Article III requirements). Cf., *Gwaltney*, 108 S.Ct. at 356 (plaintiff must prove the standing allegations in order to prevail). Only at that juncture can the court ascertain whether the claimed injury is "likely to be redressed by the requested relief." *Allen v. Wright*, 468 U.S. 737, 751 (1984). Since it is the citizen "who is seeking relief subject to [judicial] supervision, it follows that he must carry throughout the litigation the burden of showing that he is properly in court." *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936). Regardless what was alleged, no ongoing violation was shown as a predicate for relief.

[2] On July 31, 1986, the court found ongoing compliance by Petitioner since the inception of suit: "Commencing with the report due in October, 1984, and continuing through the present Simkins has filed quarterly discharge monitoring reports as requested by its permit." Pet. App. 51a. In disregard of that finding (Pet. 24-26), however, the court below held that "Simkins did not file a complete DMR until January 15, 1985, almost three months after Sierra Club filed its suit on October 31, 1984". (Pet. App. 10a). Even if it be assumed for standing purposes that full compliance was not achieved until January 15, 1985, and even though Simkins could not have filed *quarterly* DMRs with monitoring results for October, 1984, before January, 1985 at the earliest, the operative fact remains that such compliance had been continuous throughout the 18 months before the penalty assessment.

[3] The Government agrees that Sierra Club was obliged by Article III to demonstrate "personal injury traceable to the defendant's allegedly unlawful conduct" and that its showing "is arguably in-

and obtain judgment for penalties only. Based solely upon past violations for 11 quarters ending March 31, 1984, the court assessed unconditional civil penalties of $977,000 (Pet. App. 55a).

In short, the record in this case presents every factor which occasioned the former Solicitor General in *Gwaltney* to express Article III concerns. In a dramatic shift of position, the Government now contends that the unconditional assessment of penalties, "payable only to the United States Treasury" (Gov. Br. 3), deters future violations and thereby constitutes "exactly that type of redress" which satisfies Article III (*id.* at 10). We submit that the question remains one of "fundamental constitutional magnitude" (Pet. 11) that should be settled by this Court. Rule 17.1(c). The question is undiminished in its importance by the fact that the Government has altered its views as to its ultimate resolution.[4]

2. The *Gwaltney* decision provides "significant guidance on the subject" (Gov. Br. 14) but does not support the Government's position on Article III redressability. In *Gwaltney*, the Court declared that citizens "may seek civil penalties only in a suit brought to enjoin or otherwise abate an ongoing violation." 108 S.Ct. at 382. Thus, "the interest of the citizen-plaintiff is primarily forward-looking" and "the harm sought to be addressed by the citizen suit lies in the future." *Ibid.* However, the "connection between injunctive relief and civil penalties"

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sufficient to satisfy that constitutional requirement." Gov. Br. 8 n.6. The injury-in-fact issue is not raised directly in the petition (*ibid.*), but is subsumed in the "redressability" question which "examines the causal connection between the alleged injury and the judicial relief requested." *Allen v. Wright*, 468 U.S. 737, 753 n.19 (1984). Moreover, Article III standing always remains open to inquiry. *Bender v. Williamsport Area School Dist.*, 475 U.S. 534, 541 (1986). See *Gwaltney*, 108 S.Ct. at 388 (concurring opinion).

[4] Accordingly, this Reply is devoted entirely to the Government's treatment of the Article III question. It adopts and supplements, but does not reiterate, Petitioner's earlier submissions. See Pet. 10-19; Pet. Rep. Br. 1-4.

(*ibid.*) is broken if the suit proceeds to judgment "solely for civil penalties for past, nonrecurring violations." *Id.* at 382 n.3. Such a judgment, in the words of the former Solicitor General, "would not redress in any meaningful way the citizen's alleged injuries" (86-473 U.S. Br. 21 n.34).

The Government argues in response that citizens have standing because penalties can serve as a specific deterrent against future violations. Gov. Br. 12.[5] Contending that an injunction is not an Article III prerequisite (*id.* at 10 n.10), the Government insists that penalizing violators confers a tangible and direct "benefit" upon a citizen-plaintiff "because the assessment, like an injunction, deters the violator from continuing the violations that prompted the plaintiff to file the suit." Gov. Br. 9.

We submit that *Gwaltney* implicitly rejected the premise that penalizing a past violator constitutes Article III redress of the citizen's prospective interest in abatement. Remedial measures, like an injunction, redress a citizen's "forward-looking" interest in preventing future harm (108 S.Ct. at 382). Indeed, "[t]he sole function of an action for injunction is to forestall future harm." *United States v. Oregon State Medical Soc.*, 343 U.S. 236, 333 (1952). An injunction is "unrelated to punishment" even if "the calendar of years gone by might have been filled with transgressions." *Id.*

In sharp contrast, a civil penalty is not concerned with a citizen's injury or its redress. A penalty "is an exaction imposed by statute as punishment for an unlawful act." *United States v. LaFranca*, 282 U.S. 568, 572 (1931). The statutory basis for the penalties here at

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[5] The Government suggests that an interest in "general deterrence" probably would not satisfy Article III and that, in any event, Congress has not authorized citizen suits brought solely to vindicate that interest. Gov. Br. 12 and n.13. It thus contradicts Judge Winter's dictum below that the trial court "was of course not obliged to find that Sierra Club's lawsuit had a specific immediate deterrent effect in this case in order to find that Article III standing existed." Pet. App. 8a n.5.

issue, 33 U.S.C. § 1319(d), was construed in *Tull v. United States*, 481 U.S. 412, 423 (1987): "Subsection 1319(d)'s authorization of punishment to further retribution and deterrence clearly evidences that this subsection reflects more than a concern to provide equitable relief." *Ibid.* Such "a civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can be explained only as also serving either retributive or deterrent purposes, is punishment, as we have come to understand the term." *United States v. Halper*, 57 U.S.L.W. 4526, 4530 (May 16, 1989).

The penalties imposed below can only be explained as serving twin punitive objectives. Their assessment dealt with defendant's past conduct and the punishment deserved, with no focus upon the plaintiff's claimed injury. The Article III decisions of this Court (Pet. 18-19) do not suggest that, when all else fails, citizens may acquire standing merely to obtain a decree promoting deterrence and retribution.

3. The judicial power to punish violators of federal laws by imposing civil penalties payable to the Treasury is unquestioned. However, when the same power is exercised on demand of a private citizen suing alone and "on his own behalf" [6] for a punitive judgment enforceable by the United States, the citizen's Article III standing is open to grave question. The Government reads the Clean Water Act as "authorizing citizens to secure exactly that type of redress." Gov. Br. 10. It concedes, as it must, however, that even "Congress may not confer standing to sue where the Article III requirement has not been met." *Id.*, at 8.

The Government is unable, after months of scholarship, to identify a single decision of the Court responsive to the Article III redressability question here posed.[7] Find-

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[6] Section 505(a) of the Clean Water Act, 33 U.S.C. § 1365(a).

[7] The decisions quoted in text (Gov. Br. 10, 11), *Weinberger v. Romero-Barcelo*, 456 U.S. 305 (1982), and *Albemarle Paper Co. v.*

ing no guidance in precedent, the Government endeavors to sustain the provision for citizen penalty suits by a proffered analogy to contempt sanctions:

> Contrary to Simkins' repeated assertions (Pet. 10-15), there is no Article III significance in this context to the fact that the civil penalties are payable to the Treasury. If a court attempted to secure compliance through the issuance of an injunction, the court would similarly rely on the threat of monetary penalties payable to the Treasury (in the form of contempt sanctions) to insure that the injunction were obeyed. Thus, the injunctive remedy and the civil penalty ultimately rely on the same sort of monetary sanctions to redress the citizen's injury.

Gov. Br. 9-10 n.8. With deference, it is extremely significant that the penalties are payable to the Treasury. *Nye v. United States*, 313 U.S. 33, 43 (1941). The Government simply fails to pursue its analogy to a logical conclusion.

Civil contempt sanctions presuppose an injunction issued for the benefit of a party having Article III standing to obtain the order. "There can be no question that courts have inherent power to enforce compliance with their orders through civil contempt." *Shillitani v. United States*, 384 U.S. 364, 370 (1966). Civil fines are employed to coerce the contemnor into compliance with the order or compensate the complainant for losses sustained. *United States v. United Mine Workers of America*, 330 U.S. 258, 303-04 (1947). Obviously, the compensatory model does not fit the Government's analogy, because the fine imposed is payable to the complainant and must be

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Moody, 422 U.S. 405 (1975), each addressed the extent of judicial discretion to deny equitable relief. Punitive sanctions were not at issue. In imposing civil penalties below, the trial court was foreclosed by circuit precedent from exercising discretion to decline their assessment. *Stoddard v. Western Carolina Regional Sewer Auth.*, 784 F.2d 1200, 1208 (4th Cir. 1986) (penalty is mandated in citizen suit establishing past violations, the amount being discretionary).

based on actual loss. *Id.*, at 304. What the Government evidently has in mind is a coercive fine, payable to the United States. In that respect, however, the analogy is inapposite because a coercive fine is conditioned upon compliance and is payable only if disobedience persists. *Penfield Co. of California v. Securities & Exchange Com'n*, 330 U.S. 585, 590 (1947).

The analogy to civil conduct breaks down completely when it is recognized that the fine (coercive or compensatory) "is *wholly remedial*, serves *only* the purpose of the complainant, and *is not intended as a deterrent to offenses against the public.*" *McCrone v. United States*, 307 U.S. 61, 64 (1939) (italics added). See *Penfield Co. of California*, *supra*. The civil penalty imposed upon the Petitioner was not of that character. It "was unconditional and not relief of a coercive character" and, as such, "was solely and exclusively punitive in character." *Id.*, 330 U.S. at 593.

An unconditional civil penalty payable to the Treasury decidely resembles a fine for criminal contempt. "When the court imposes a fine as a penalty, it is punishing yesterday's contemptuous conduct." *Penfield Co. of California*, 330 U.S. at 594. The penalty judgment was the functional equivalent of the criminal contempt order considered in *Nye v. United States*, *supra*, 313 U.S. at 43 ("The order imposed unconditional fines payable to the United States. It awards no relief to a private suitor."). See *Gompers v. Buck's Stove & Range Co.*, 221 U.S. 418, 449 (1911) (when a civil litigant is "forced to pay a fine to the government" there can be "no doubt that punishment pure and simple was sought").[8]

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[8] In *Gompers*, the Court declared that a punitive sanction for civil contempt would be "as fundamentally erroneous as if in an action of 'A vs. B', for assault and battery, the judgment entered had been that the defendant be confined in prison for twelve months." 221 U.S. at 499.

The Government can thus derive no real comfort at all from its own analogy. When penalties in the nature of a criminal fine were imposed on Petitioner, "no relief whatever was granted to the complainant, and" Sierra Club "took nothing by that decree." *Gompers*, 221 U.S. at 444. It is immaterial that "the complainant may also derive some incidental benefit from the fact that such punishment tends to prevent a repetition of the disobedience." *Id.*, at 443. Those allowed to "prosecute a criminal contempt action represent the United States, *not the party that is the beneficiary of the court order allegedly violated.*" *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 804 (1987) (italics added). See *United States v. Providence Journal Co.*, 108 S.Ct. 1502, 1507 (1988).[9]

The Court drew upon the contempt analogy in *Linda R.S. v. Richard D.*, 410 U.S. 614, 618 (1973) (reviewing a Texas statute that 'does not follow the civil contempt model" but "creates a completed offense with a fixed penalty"). It held that a citizen lacked Article III standing to press for punitive sanctions authorized by statute because the relief sought, jailing of the violator, bore no "direct" relationship to the alleged injury resulting from nonenforcement. *Ibid.* Implicit in the *Linda R.S.* holding, as well as the contempt decisions, is the realization that "specific deterrence" (Gov. Br. 12 n.2) does not suffice as a redressable interest to satisfy the Article III prerequisites. Seeking punishment for its own sake does not supply a citizen with a direct stake in the outcome needed "to justify exercise of the court's *remedial* powers on his behalf." *Warth v. Seldin*, 422 U.S. 490, 499, 500 (1975) (italics added). When a citizen cannot justify the exercise of the court's remedial powers, Article III standing

[9] Lower courts hold that a party to civil litigation lacks standing to prosecute a violator for criminal contempt. *Ramos Colon v. United States*, 576 F.2d 1, 5 (1st Cir. 1978); *Kienle v. Jewel Tea Co.*, 222 F.2d 98, 100 (7th Cir. 1955) (complainant's "interest is no greater than that of every member of the general public").

does not exist. The citizen "has an interest, but no direct stake," in the penalty assessment. *Diamond v. Charles*, 476 U.S. 54, 67 (1986).

4. The Government submits that a citizen should have Article III standing to seek imposition of civil penalties "privided that he continues to face a *possibility* of remedial injury." Gov. Br. 11 (italics added). A "substantial likelihood" that injury will be redressed is what Article III requires. *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 45 (1976). A bare possibility does not suffice. *Connecticut v. Massachusetts*, 282 U.S. 660, 674 (1931).[10] "It is the *reality* of the threat of repeated injury that is relevant to the standing inquiry, not the plaintiff's subjective apprehensions." *Los Angeles v. Lyons*, 461 U.S. 95, 107 n.8 (1983) (italics in original). The Government does not suggest that the record would confirm that any such reality was demonstrated below.

CONCLUSION

For the foregoing reasons, and those in the Petition, this Court should grant the writ and reverse the decision of the court below.

Respectfully submitted,

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[10] Rather, it must be shown that "there exists some cognizable danger of recurrent violation, something more than a mere possibility which serves to keep the case alive." *United States v. W.T. Grant Co.*, 345 U.S. 629, 633 (1953). This is echoed by the statement in *Gwaltney* that there must be "a reasonable likelihood" that past violations "will continue * * * in the future." 108 S.Ct. at 381.